Petition

81-445

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

BROADWAY DELIVERY CORP., et al.,
Petitioners,

vs.

UNITED PARCEL SERVICE OF AMERICA, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Second Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals, after finding that the District Court's instruction which prohibited the jury from finding in favor of the petitioners on their monopolization claim was erroneous, deprived the petitioners of their Constitutional right to trial by jury by nonetheless holding that the error was "harmless" even though the evidence showed that: the defendants had no competitors except, on a limited basis, the United States Postal Service; the defendants subsidized their operation in the local, relevant market with some $90 million generated from profits outside the local area; the defendants sustained multi-million dollar losses in the local market for nine years in a row; and the petitioners, 26 local trucking firms, lost all or nearly all of their small package business in the relevant service and product market, by reason of the defendants' practices? Whether the Court of Appeals ignored the teaching by this Court in this Court's decision in *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962)?

2. Whether a dominant company with unparalleled revenues and profits in an industry may, with impunity, subsidize a local market price-cutting campaign with revenues and profits generated outside the local market, where the effect is to substantially lessen, if not completely destroy, competition in the local market?

3. Whether the Court below erred in finding, contrary to the unequivocal state of the record, that petitioners had abandoned their claim under Section 1 of the Sherman Act after the District Court had previously entered summary judgment against petitioners.

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, petitioners submit the following list of companies and entities:

1. Alco Express Co.
2. Al's Auto Express Corp.

3. Bernie's Express, Inc.
4. Borough Express, Inc.
5. Broadway Delivery Corp.
6. Cohen Express Corp.
7. Conduit Rapid Delivery Co., Inc.
8. Consolidated Carriers Corp.
9. Dynamic Delivery Corp.
10. Economy Packing & Shopping Co., Inc.
11. Felson Enterprises, Inc.
12. Greenberg's Express, Inc.
13. Jomor Carriers, Inc.
14. Major Dependable Delivery Corp.
15. Mazzeo & Sons Express
16. Messenger Services, Inc.
17. Milton Feinberg, Inc.
18. Newmark-Hurwitz Trucking Corp.
19. Sandick Transportation Corp.
20. Satsuma, Ltd.
21. Siegel & Cohen Express, Inc.
22. Silver Line, Inc.
23. Stone's Express, Inc.
24. Streichler Trucking Co., Inc.
25. Style Carriers
26. Trucking Services, Inc.

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PETITION FOR WRIT OF CERTIORARI
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Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on June 3, 1981, which affirmed the judgment entered against the plaintiffs-petitioners in the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 651 F.2d 122 (2nd Cir. 1981), and is attached hereto as Appendix "A."

On March 14, 1975, the petitioners filed their complaint charging the defendants with violations of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2).

On May 2, 1979, the District Court granted summary judgment in favor of the defendants on petitioners' Section 1 claims.

On June 2, 1980, the trial began on petitioners' Section 2 claims.

On July 10, 1980, after six weeks of trial, the District Court erroneously instructed the jury on petitioners' monopolization claim. On July 18, 1980, after seven days of deliberations, the jury returned a verdict in favor of defendants.

On July 22, 1980, after hearing on post trial motions, judgment was entered in favor of defendants.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 3, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Amendment VII to the Constitution of the United States (U.S. Const. Amend. VII):

"Amendment VII—Civil Trials

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

A. Nature Of The Case

This is a private antitrust case brought by the plaintiffs under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) alleging injury and damage to their businesses caused by reason of the defendants' violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

1. The Industry Involved

The service industry involved in this lawsuit is the pick-up and delivery of small packages and parcels. This service has two aspects: the retail and the wholesale.

The retail pick-up and delivery of small packages involves the pick-up of packages from retail stores, such as large department stores, and the delivery of those packages to the homes of the stores' customers. This service is paid for by the stores.

The wholesale pick-up and delivery of small packages involves the pick-up of packages from wholesale businesses, such as garment manufacturers, and the delivery of those packages to retail stores. This service is paid for by the manufacturers, but the cost is ultimately passed on to the stores.

In the wholesale pick-up and delivery market for a given geographic area there are usually three separate segments:

the pick-up of the parcels from the local manufacturers by truck or handcart; the consolidation and grouping of those packages according to the various retail stores designated to receive them; and, finally, the delivery of the consolidated packages to the designated retail store.

This case involves the breakdown of competition in the *wholesale* market. The *retail* market is germane to this case only to the extent that the defendants used their dominant, monopolistic position in that market to gain a competitive advantage in the wholesale market.

2. The Dynamics of the Wholesale Market

There are three kinds of wholesale pick-ups and deliveries: (1) the local pick-up and delivery where the manufacturer is local and the designated retail store is local; (2) the situation where the manufacturer is local but the designated retail store is not; and (3) the situation where the designated retail store is local but the manufacturer is not.

Except for the purely local transaction, where a single entity may perform the pick-up, consolidation and delivery of a package, the three different segments of the wholesale market are generally handled by three distinct groups of entities.

The pick-up from manufacturers in the Metropolitan New York area is done by a number of independent trucking companies. These independent companies pick-up packages from local manufacturers and deliver them to consolidators or to the United States Post Office. For incoming packages, these independents pick-up packages from consolidators and deliver them to local, designated retail stores. Most of the plaintiffs in this case were involved in this segment of the business which is the purely local aspect of the market.

The consolidation of packages is done by a number of independent consolidators or by the United States Post

Office. Neither the independent consolidators nor the Post Office are engaged in the business of picking up packages from manufacturers. After the consolidators or the Post Office receive packages from the independent trucking companies, they group the packages according to destination. After the packages are grouped, they are transported to the various retail stores which are the addressees. This delivery is generally done by other independent, long-haul trucking companies. These trucking companies either deliver the packages directly to the designated store or to another consolidator where the procedure is reversed. In the case of the Post Office, the Post Office uses its own trucks to deliver its packages or arranges for commercial air or rail transportation to another Post Office for distribution.

This same procedure is followed by the defendants, except that UPS operates its own facilities which provide for all three segments. UPS pick-up trucks pick up packages from manufacturers. Those trucks deliver the packages they have picked up to a UPS consolidating facility. The UPS consolidating center then groups the packages according to destination. After the packages are grouped, UPS provides transportation to the designated areas, either by UPS tractor-trailers or by commercial air or rail transportation. Like the independents, UPS tractor-trailers either deliver the packages directly to the retail stores or to a UPS consolidating center for distribution and delivery by local UPS delivery trucks.

B. The Parties In This Case

1. The Plaintiffs

There are 26 plaintiffs. All are small motor carriers, consolidators, and freight-forwarders engaged exclusively in the wholesale business of picking-up, transporting, and delivering general merchandise, but especially cloth, garments, and clothing accessories, between garment manu-

facturers and retail stores located in the metropolitan areas of New York and New Jersey. Most of the plaintiffs' traffic originates in the New York garment district.

2. The Defendants

Defendant United Parcel Service of America, Inc. ("UPSA") is a corporation organized and existing under the laws of the State of Delaware. UPSA is a holding and management company which owns all of the stock of defendant United Parcel Service of New York ("New York Company") and all of the stock of non-defendant United Parcel Service of Ohio ("Ohio Company"). Defendant New York Company is a trucking company engaged in the business of transporting goods for hire throughout the northeastern United States. Its business includes the transportation of garments and related goods within the metropolitan area of New York. The New York Company, together with the Ohio Company, which is a trucking company serving states outside of the northeastern area, cover the entire United States in transporting goods for hire. All UPS stock is held by present or former UPS employees.

The combination of UPS companies is the largest trucking company in the United States. In 1961, the first year with available figures during the relevant time period, UPS handled 207,000,000 packages. In 1975, UPS was handling almost a billion packages per year, or 930,000,000. In 1961, UPS had 9,100 vehicles. In 1975, UPS had 40,400 vehicles. In 1963, the first year with available figures, UPS had 73,000 wholesale customers. By 1975, that figure was 351,000. In 1968, the first year with available figures, UPS had total delivery revenues of $412,468,333. By 1975, that figure was $1,614,936,000. For the same time period, UPS showed assets of $218,392,841 in 1968 which grew to $695,606,000 by 1975. From 1968 to 1975, UPS' net worth almost quadrupled from $111,173,307 to $420,478,000. And, from 1969 to 1975, UPS increased its operating profit from $66,588,713 to $165,826,000.

C. Material Facts

During the relevant period, from 1960 to 1975, both the New York and Ohio companies operated pursuant to a management contract with UPSA whereby each company agreed to pay to UPSA a management fee in the amount of 4½% of its gross receipts plus 50% of its net profits. In addition, during this same period, UPSA agreed to indemnify both the New York and Ohio companies to the full extent of any operating losses sustained by either company in any year. (Court Exhibit 104)

As a result of that agreement, the following amounts were paid by the Ohio and New York companies to UPSA over a fifteen year period:

	Ohio Company	New York Company
Amounts paid to UPSA	$477,304,702	$178,084,574
Average percentage contributed to UPSA	65.7%	23.1%

Only the New York Company received indemnification from UPSA as a result of losses that it had sustained:

	Ohio Company	New York Company
Indemnifications received from UPSA	0	$ 37,610,393

In addition, only the New York Company received cash operating advances from UPSA:

	Ohio Company	New York Company
1975 Balance	0	$ 57,366,519

Thus, during the relevant time period, the New York Company received subsidies and cash advances from UPSA totalling $94,976,912.

To a great extent, the operating losses sustained by the New York Company were contributed by the New York Company's Metro New York District. The New York Company is divided into many geographic operating districts. From 1960 to 1967, the Metro New York District

included the metropolitan area of the City of New York and all of Long Island. In 1967, Long Island was spun-off into a separate operating area known as the Long Island District.

The results of the New York Company's wholesale operation for the Metro New York District, as reflected in defendants' own internal accounting documents (PX. 42), show that that district operated substantially below cost for *nine* years even though it achieved extraordinary gains in revenue and in the number of packages handled per day.

UPS OF NEW YORK
OPERATING SUMMARY—WHOLESALE
NEW YORK METROPOLITAN

	Revenue	Packages/Day	Profit/Loss
1960	$ 7,748,000	50,600	$ (674,000)
1961	8,634,000	50,100	(477,000)
1962	9,073,000	58,600	(1,420,000)
1963	13,568,000	71,200	(1,199,000)
1964	18,822,000	94,800	(1,478,000)
1965	24,271,000	117,200	(1,225,000)
1966	26,615,000	124,900	(1,778,000)
1967	19,203,000	81,900	300
	*31,554,000	*134,000	*(125,000)
1968	17,675,000	87,500	(401,000)
	*29,495,000	*145,000	*(1,028,000)
1969	28,652,000	110,000	3,439,000
	*48,888,000	*186,000	*4,625,000
1970	32,525,000	117,800	2,238,000
	*56,743,000	*206,600	*516,000
1971	36,511,000	124,100	813,000
	*64,166,000	*220,200	*49,000
1972	42,116,000	137,000	2,481,000
	*76,487,000	*252,000	*2,871,000
1973	44,378,000	142,000	(99,000)
	*81,839,000	*236,000	*1,011,000
1974	37,510,000	161,000	(9,313,000)
	*69,008,000	*294,000	*(18,272,000)
1975	55,388,000	162,000	(2,961,000)
	*101,968,000	*298,000	*(3,815,000)

*Before 1967, the New York Metro market included Long Island. Beginning in 1967, Long Island became a separate UPS geographical designation. The figures following the asterisks are New York Metro and Long Island combined.

UPS did not care what its costs were for its wholesale, as distinguished from retail, operations in Metropolitan New York. As H. Oberkotter, Chairman of the Executive Committee and former Controller and Chairman of the Board of the parent UPSA and the New York Company, candidly testified:

> "A. In the exempt zone[1] the rates were uniform.
> "Q. Was that without regard to the costs?
> "A. Yes, that's right.
> "Q. So regardless of whether or not those were the rates you were going to charge, regardless of whether or not they covered your costs in the area, isn't that right?
> "A. Yes." (TR. 2159)

Indeed, when UPS entered the wholesale market in the early 1960's, it did not even consider the profit that might be obtained:

> "Q. In the 1960's did you consider the profit that might be obtained from an area in choosing whether or not to obtain rights into that area?
> "A. I would say no." (TR. 185)

Nor did UPS give any consideration to the number of competitors already present in the market. A UPS executive gave the following astonishing testimony:

> "Q. Did you consider in going into the wholesale business in metropolitan New York, did you consider the number of competitors who were in that business, as far as you know?
> "A. There was nobody in this business." (TR. 183)

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[1]The "exempt zone" covered Manhattan. The "exempt zone" was that area where regulatory bodies did not control, approve or authorized rates or routes.

The practices of UPS in the wholesale market, and its complete disregard of profit or loss there, can be contrasted with its conduct in the retail market. From its inception at the turn of the century until 1953, UPS was, with minor exception, exclusively in the retail business. From 1944, UPS had become the delivery arm of "all of the major department stores in New York." (TR. 2231). At the retail level, UPS entered into "long term contracts" with the "major retail stores" which "required that retail store [to] deal exclusively with UPS." (TR. 2148). The "usual procedure" of UPS when it entered into these contracts was to "take over" the retail store's "trucks and their drivers and their other equipment" related to their delivery service. (TR. 2146). In that position in the retail market, H. Oberkotter testified to the manner in which UPS would arrive at a rate to charge the stores:

> "A. Our rates to the major department stores did naturally include a profit percentage above actual costs, right.
>
> "Q. And in the cost, you included the 4½ percent management fee that was payable to UP of A?
>
> "A. Yes.
>
> "Q. So that in effect what you did at retail was, you found out what your costs were, and including in that would be the 4½ percent, and then you would add on a little more for your profit, and that's what you would charge the store, is that right?
>
> "A. Right." (TR. 2150).

UPS' dominant position in the retail market offered substantial advantages to its wholesale operations. For example, since UPS charged department stores for their retail deliveries on a cost-plus basis, it was easily pointed out to the department stores that, because UPS' retail and wholesale operations were commingled, an increase in UPS' wholesale delivery volume would result in cost effi-

ciencies to UPS which could and would be passed on to the department stores as a lower cost basis on their cost-plus contracts. This provided the right kind of incentive for retail department stores, who were important *receivers* of wholesale merchandise from manufacturers, to require the manufacturers with whom they did business to ship via UPS. Thus, the retail stores increased UPS' wholesale business in an attempt to reduce their own retail delivery charges:

> "Q. Was there an effort, as far as you know, by UPS to advise the retail stores that they would have—it would be advantageous to them to have both the wholesale and the retail done by UPS?
>
> "A. We did indicate that as we were able to acquire more volume of either kind, we would have a good opportunity to lower the average cost, yes." (TR. 2170).

And:

> "Q. To your knowledge, did UPS ever advise any retail store that if UPS had its wholesale business, that that store's costs would go down?
>
> "A. I don't think we ever guaranteed that to anyone, but I think that we certainly indicated to the retail stores at the time that we were going into this common carrier business that with the retail volume of the stores decreasing, resulting inevitably in substantially higher costs per package to handle it separately, that we hoped that with the addition of common carrier volume it would help their costs also on the retail store delivery volume." (TR. 229).
>
> • • •
>
> "Q. In the metro New York district, did you commingle your retail business with your wholesale business?
>
> "A. Yes.

"Q. Did that provide lower cost to the retail stores for their retail delivery?

"A. We believe each helped the other. The retail helped the wholesale and the wholesale helped the retail." (TR. 2169).

And:

"Q. Did you by reason of your wholesale business lower the average costs on the retail side for any retail store in the New York metro district?

"A. No, but the increased rates to the retail stores were less than they would otherwise have been." (TR. 2172-73).

In its arrogance, and because of its power and size, UPS, through its corporate officers, believed that its only real competitor in the parcel delivery market was the United States Postal Service:

"Q. Did you and do you believe that UPS provided the kind of service that no one else was providing anywhere else in the United States?

"A. Yes.

"Q. Did you think you had any competitors?

"A. We knew we had Parcel Post, and that was enough for us." (TR. 186).

Nevertheless, and in fact, the Post Office and UPS never did compete. The Post Office did not pick-up packages, but would only deliver those parcels which had first been delivered to it. UPS, on the other hand, discouraged the sporadic attempts of some of its customers to deliver packages directly to its consolidating facilities and encouraged its own pick-up services, for which it charged a weekly fee of $4.00 in the New York Metro District. Unlike the Post Office, UPS discouraged shipments from the casual, non-

business shipper and encouraged shipments from manufacturers and small businesses.

UPS, as contrasted with the Post Office, concentrated on soliciting the smaller packages, which were easier to handle and provided more lucrative returns. (PX. 42; TR. 976; 1301). The average package handled by UPS was eleven pounds. (TR. 2166). The larger packages were more costly to handle. (TR. 2168). As a result, UPS' rates were typically lower than even the United States Post Office for the smaller packages, but higher for the more costly and less profitable larger packages:

> "Q. I understand that, but what I am asking is, was this a similar pattern or was it—or would this be an unusual case? That's what I am asking?
>
> "A. Well, I guess it is a similar pattern, that there are rates that down through some mid-point had a tendency to be a little under Parcel Post and theirs from there on would be higher—I mean the reverse would be true.
>
> • • •
>
> "Your packages would be lower for the smaller, lighter type packages and Parcel Post's rates would be lower for the larger, heavier type packages, is that correct?
>
> "A. For various dates, that was a typical relationship." (TR. 2239).

Yet, while UPS charged lower rates for the smaller packages vis-a-vis the Post Office, UPS was able to extract an "arbitrary" $4 pick-up charge (which the Post Office did not do) from its wholesale manufacturer customers. This $4 pick-up charge in New York is contrasted with the $2 pick-up charge elsewhere in the country. The following testimony is illustrative of many of the aspects of this

case and the attitude of UPS about the existence of competition:

> "In New York we thought that we could too, but our people thought that the conditions around New York might be such that the pickup cost would be somewhat more expensive, particularly the cost of just making the driver—having the driver stop every day where he didn't get any packages.
>
> "So they thought, well, whereas it is $2 out in Los Angeles, we will just charge $4 here.
>
> "We thought that there should be something higher, and so they arbitrarily selected $4. That $4 has remained unchanged ever since 1953, and people are paying it and we think it is a very good bargain.
>
> "I personally don't think that the added $2 a week is necessary in New York any more because we found that the fact of the traffic congestion and what would seem like a difficult area to pick up packages was offset by the tremendous volume available, but the $4 was simply picked by our people as a matter of judgment as a reasonable charge in 1953 and continued ever since." (TR. 103-104).

UPS' own documents show that the New York Company sustained continuous and heavy losses in its Metropolitan New York operations between 1960 and 1975, while the Ohio Company made huge profits during those years. (PX. 42; Court Exhibit 104). The only way that the New York Company could continue in business in New York City was through its subsidization agreements with the parent UPSA. Profits from the Ohio Company were siphoned into the New York Company to shore up the Metropolitan New York operating district. Yet, the evil of subsidization and its potential harmful effect on competition, was not something about which UPS was unaware.

Indeed, UPS, in its lobbying efforts directed against the Post Office, railed against what it perceived to be the unlawful subsidization of the Parcel Post system in violation of the antitrust laws. A UPS memorandum prepared in July of 1972 reveals both UPS' sentiment and fear:

> ". . . the sole concern of United Parcel Service is that the rates for parcel post shall be at a level sufficient to cover the costs of providing the service.
>
> • • •
>
> "United Parcel Service also is interested in self-preservation. If t Postal Service is permitted to subsidize the rates for parcel post to any extensive degree, no private enterprise competitor will be able to keep its business from melting away as shippers choose the service with the lower rate schedule.
>
> *"The elimination of* parcel post *competitors through rate subsidization would constitute an antitrust violation and would have the negative effect of giving shippers no choice in the marketplace."* (PX. 47) (Emphasis added).

Moreover, Paul Oberkotter, a UPS chief executive, made the following statements on this subject:

> "Rather by proposing Parcel Post rates which are noncompensatory, the postal service is attempting to capture business it could not otherwise obtain." (TR. 366).
>
> • • •
>
> "If allowed to continue this practice, the postal service will be able eventually to eliminate all private enterprise competition in the parcel delivery field." (TR. 373).

Ironically contrary to UPS' own practice, Paul Oberkotter made a final statement:

> "*United Parcel Service and other private enterprise carriers must charge rates which generate sufficient revenues to recover all costs and earn a profit*, and those rates must be constantly increased in an inflationary economy to reflect higher labor costs and taxes and other price rises. Unless this Commission acts as we suggest, *the rates for Parcel Post service will be increasingly lower in relation to the rates for competitive parcel delivery services and an unjustified shift of delivery business from competing parcel services to the postal service will occur.* This would directly result in the destruction of companies in the private sector engaged in the transportation of packages." (TR. 377, 378) (Emphasis added).

Just as UPS had prophesied to the Postal Rate Commission, "private enterprise competition in the parcel delivery field" was eliminated in the New York Metro District as a result of unfair subsidization and below cost pricing. But it was not UPS who was eliminated, it was the hundreds of small parcel delivery businesses like the plaintiffs who found that they could not exist in the anticompetitive climate that had been seeded by UPS. By its actions, through its retail dominance and by its ability to absorb losses, UPS created the "negative effect of giving shippers no choice in the marketplace."

It was an impossible situation for local competitors. Because of the subsidization of the New York Company, permitting it to lose millions of dollars while substantially increasing its business, the UPS pick-up trucks, especially in the lucrative garment area of New York, literally flooded the streets. (TR. 988; 1094; 1148). The UPS trucks would remain curb-side in these areas until filled, and then stay

until other, empty UPS trucks took their places. (TR. 1094; 1439). The power of UPS was so strong that manufacturers, instead of having UPS come up to their place of business to pick up their packages as UPS had contracted to do, would actually bring their packages down to the UPS trucks and line-up waiting to have their packages accepted. (TR. 1982). Plaintiff after plaintiff testified that it could not match UPS' rates without going completely out of business, (TR. 969; 1128; 1357; 1978), even though it was demonstrated that the service of the local competitors was as good as and generally better than UPS. (TR. 1357; 1437).

Competitive advantages increased geometrically for UPS in New York, even though the New York Company could never have stayed in business there on its own. Even though the drivers of both UPS and some of the plaintiffs were members of the Teamsters, UPS was able to secure more favorable wage agreements with the union. (TR. 1894-96; 1898-1900). And then, when UPS was struck by the Teamsters in 1974, the impact on the New York garment center was devastating. The aftermath of this strike provides a vivid picture of just how thoroughly UPS had succeeded in monopolizing the wholesale parcel delivery business in New York City. During the strike, which was directed against and only affected UPS, the small parcel pick-up and delivery business came to a standstill. The plaintiffs, and other small parcel delivery services, were inundated with packages. It was impossible to handle the business. Even the Post Office, which did not pick-up, was swamped with deliveries from wholesale manufacturers. (TR. 2242-43).

But even during this strike period, when UPS was unable to make its own pick-ups, UPS refused to cooperate with local competitors, who had attempted to fill the void, by refusing to accept shipments delivered by the local carriers

to the UPS consolidating facility. Instead, UPS imposed its own embargo on the City of New York. (TR. 1436). And at other times, when UPS was asked by a shipper to deliver a package to an independent consolidator, UPS would demonstrate its monopolistic arrogance at the expense of its local competition by refusing to wait behind other delivery companies to unload its packages. UPS simply brought its packages back to the sender charging that the consolidator had refused to accept them. This action required local consolidators to set up special facilities for UPS. (TR. 2019-2022; 616-625).

UPS knew that its practices in its New York Metro District were having a debilitating effect on competition there. It also knew, however, that the New York City area was one of the most important operating areas in its entire system because the packages that were generated there for dispersal throughout the country effectively fed UPS' operations in other areas across the United States. New York was important to UPS to complete its "national hookup." The local losses sustained in New York were peanuts compared to the profits generated elsewhere. As a result, it was and is quite clear that, no matter how unprofitable UPS' Metro New York operation was, and no matter how much money was required to be siphoned out of UPS' operating profits from elsewhere in its system in order to subsidize the New York losses, UPS "certainly would not want to give that up *because of some local situation.*" (TR. 203-204).

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals, by Finding Facts Contrary to the Evidence, by Judging the Credibility of the Witnesses and by Ignoring the Impact of the District Court's Admittedly Erroneous Instruction to the Jury, Has Directly Contravened This Court's Opinion in Continental Ore v. Union Carbide and Carbon Corp.

In *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), this Court reversed the Court of Appeals which had held that, even though the District Court had erroneously instructed the jury, the evidence was such that the District Court should have granted a directed verdict. Like this case, the Court of Appeals in *Continental Ore* did nothing more than to engage in fact-finding contrary to the petitioners' Constitutional right to trial by jury.

In this case and after finding that the District Court's instruction which prohibited the jury from finding in favor of the petitioners on the monopolization charge was erroneous, the Court of Appeals proceeded to make its own findings of the facts and to decide the credibility of the witnesses. This process, previously condemned by this Court's decision in *Continental Ore*, deprived the petitioners of their Constitutional right to trial by a jury and to have all the evidence reviewed in the light most favorable to the petitioners.

The Court of Appeals found that the United States Postal Service competed against the defendants, even though the Post Office did not, unlike plaintiffs and defendants, engage in pick-up service. The Court of Appeals ignored the fact that the defendants subsidized their losses in the local market with approximately $90 million generated outside the local market. The Court of Appeals decided the credibility of the testimony of the defendants' accountant, notwithstanding the impeachment of the witness (TR. 2405-

2456) and the admissions that the witness was forced to make, including the fact that the witness' firm, when called to make a contrary analysis showing losses rather than profits, willingly obliged. The Court of Appeals ignored the testimony of the defendants' executives who admitted the difference of practice in markets where the defendants had no competitors. The Court of Appeals ignored the fact that the defendants in fact recognized the cost differences between the local market and outside markets. The Court of Appeals ignored the fact that the defendants distinguished the retail market from the wholesale market. The Court of Appeals ignored the fact that the defendants used their dominant position in the retail market, *inter alia*, to support their wholesale operations. The Court of Appeals ignored the fact that the defendants' rates in the local market, an exempt zone, were not controlled by the ICC, and that, in fact, the defendants had a different pick-up charge in the exempt zone than elsewhere.

In short, the Court of Appeals ignored the record.

Under the Constitution and this Court's decision in *Continental Ore*, the Court of Appeals, having found that the instruction concerning market share was erroneous, was obliged to remand the case for a new trial.[3]

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[3]In addition, the Court of Appeals failed to decide issues presented to it relating to the admissibility of evidence at trial. For example, the District Court refused to allow plaintiffs to testify during trial as to the reasons given to them by their customers in the New York area for failing to continue to deal with plaintiffs. This evidence was refused notwithstanding this Court's explicit opinion to the contrary in *Lawlor v. Loewe*, 235 U.S. 522 (1915).

Had the jury been presented this evidence, they could have concluded that plaintiffs' exclusion from the market was due to UPS' low rates, and not the result of plaintiffs' inadequate service, as defendants alleged. This issue was not even treated by the Court of Appeals, further demonstrating that the Court below failed even to consider its obligation to present the entire evidence to the fact finder for decision.

B. The Issue of Subsidization by a Major Firm Not Constrained by Local Costs, an Issue Totally Ignored by the Court of Appeals, Raises Substantial and Important Questions with Regard to the Applicability of the Antitrust Laws

The Court of Appeals totally ignored the petitioners' claim that subsidization by a dominant firm violates the antitrust laws. This issue raises an important and substantial question with regard to the viability of the antitrust laws. If this kind of conduct, recognized even by the defendant when it viewed the possibility of the Post Office subsidizing its parcel post operations, is permitted, then any large firm will have a road map for the wholesale elimination of local competitors in local markets. If a major firm is permitted to engage in such conduct with impunity, then any local market could be ravaged by a dominant firm willing to sustain local losses supported by an outside treasury without having to compete by affording the best possible product or service at the lowest possible price. This is especially so in a service business where the costs of the local market confine the local competitors, and where, as in this case, a dominant interstate company, which does not even consider the local costs incident to providing its service, could and would cause a breakdown of any competition in the local area.

Only if the policy of the United States is to foster the dominance of already powerful companies over the existence of local competition could such a "road map" of destruction of local competition and local markets prevail. The end product of such a policy, of course, is the elimination of local competition and the establishment of local monopolies by dominant interstate firms.

In *Marnell v. United Parcel Service of America, Inc.*, 1971 Trade Cases, ¶ 73,761 at 91225 (N.D. Cal.), retired

Associate Justice Thomas Clark, sitting by designation as the trier of fact, described the UPS subsidization agreement as follows:

> "UPSA is the national money-bag for UPS operating companies. In addition to furnishing services, one of its prime functions is financial, not only in new operations, such as wholesale, but in acquisitions, losses, and anti-competitive activity. It receives its funds from an arbitrary assessment of all companies, irrespective of service and regardless of whether earned from wholesale or retail operations. In short, in addition to commingling its packages for delivery, UPS is commingling its revenues from wholesale, common carrier operations and retail contract services and using them to bolster one or the other wherever needed—a national standby ready to do battle for its local operations and with a big war chest to pay for it."

The evils of subsidizing losses of one operation from revenues in another operation must be common knowledge —certainly it is not a notion with which UPS disagrees since UPS made the very same arguments about the Post Office. In law, the principle is well-settled. In this Court's decision in *Moore v. Mead Fine Bread*, 348 U.S. 115 (1954), the Court noted that if the practice were followed, "the pattern for growth of monopoly would be simple." The Supreme Court said:

> "We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices

on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business."

Similarly, in *United States v. Griffith*, 334 U.S. 100, 105 (1948), this Court noted the evils of pooling arrangements without regard to the defendant's specific intent:

"To be more specific, the defendants in the former case through the pooling of their buying power increased their leverage over their competitive situations by insisting that they be given monopoly rights in towns where they had competition, else they would give a distributor no business in their closed towns.

"It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monop-

> oly results as the consequence of a defendant's conduct or business arrangements."

In *Reynolds Metal Co. v. F.T.C.*, 309 F.2d 223, 230 (Cir. D.C. 1962), the Court of Appeals for the District of Columbia said:

> "Arrow's assimilation into Reynold's enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market for florist foil. *The power of the 'deep pocket' or 'rich parent' for one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition.*" (Emphasis added)

And in *United States v. Grinnell Corp.*, 236 F.Supp. 244 (D.R.I. 1964), Judge Wyzanski held:

> *"Hardly any indicum of monopoly power is more persuasive than the continued capacity of the asserted monopolistic combination to sustain offerings at a loss either in particular areas or in particular services or products."*
>
> "On the contrary, the evidence rather plainly indicates that acquisitions, both within and outside the relevant market, were important sources of the market power achieved by the alarm company defendants." (Emphasis added)

Finally, in *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F.Supp. 453, at 459 (W.D. Penn. 1968), the District Court made specific mention of the subsidization of losing operations and cogently observed:

> "In determining whether or not price-cutting is predatory, the size of the companies involved is

material. If the price-cutter is a small obscure company, seeking to meet the competition of a large, well-known and nationally established producer, it is natural and appropriate that its price will be somewhat lower than those of the well-advertised competitor. Such a price differential is necessary in order to obtain business, in view of the predilection of purchasers for a well-known and highly advertised product. . . . On the other hand, if it is the large, well-established company which engages in price-cutting, there is more ground for scrutinizing the facts with suspicion to determine whether a predatory or monopolistic purpose is involved.

"It is also important to determine whether the price-cutter possesses an adventitious or meretricious advantage, unrelated to competitive merits, either by reason of doing business in a multi-territorial market, where the local price-cutting can be recouped by monopolistic profits elsewhere, or by reason of being able to subsidize losing operations by the profits from a different line of commerce." (Emphasis added)

The undisputed evidence in this case demonstrates, rather dramatically, an agreement by the parent to subsidize the losses of the operating company. The evidence also clearly shows that that is what in fact happened.

The ultimate resolution of this issue will, of course, have a substantial impact upon the business community. If it does not violate the law to subsidize a local operation of a major company, then surely it will be quite simple for a large corporation to achieve pocket monopolies in local markets. The path would be easy and the local competitors could not do anything about it. This issue is the very issue that UPS raised against the Post Office. It is,

just exactly as UPS said *at that time*, an "antitrust violation."

C. Contrary to the Opinion of the Court Below, But Consonant with the Record in This Case, Petitioners at No Time Abandoned Their Claim That Defendants Had Violated Section 1 of the Sherman Act

During the course of discovery in this case, far in advance of trial, defendants UPSA and the New York Company moved for partial summary judgment in their favor on the issue of intra-corporate conspiracy.

Defendants argued that neither was capable of conspiring with the other, despite their uncontrovertibly separate corporate status, because they are in reality a single business unit. In essence, defendants asked the District Court to pierce their own corporate veils as a means of avoiding the impact of the federal antitrust laws. Defendants, however, are separate entities capable of conspiring with each other, both as a matter of law and as a matter of fact, and the District Court erred in granting their motion for partial summary judgment.[3]

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[3]The law as stated in the decisions by this United States Supreme Court explicitly and in no uncertain terms holds that common ownership and control of separate corporate entities does not absolve these separate entities from the application of the antitrust laws.

The "common ownership or control" argument put forward to defeat intra-corporate conspiracy is by no means a new wrinkle in antitrust litigation. In *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947), this Court forcefully observed:

> "Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. • • • Those corporate interrelationships of the conspirators, in other words, are not determinative. That statute is aimed at substance rather than form. • • • And so

Upon appeal, the issue was brought to the attention of the Court of Appeals. The appeals court did not rule upon the issue, but rather concluded that plaintiffs had abandoned their Section 1 claim. In particular, the Court of Appeals stated (1) that Judge Duffy had an "open mind" on the matter *"and was willing to permit the plaintiffs to attempt to prove the elements of their § 1 claim"* (Opinion, App.A, p.9; emphasis added); (2) that the District Court *granted* plaintiffs' request to litigate the Section 1 claim before the jury (*Id.*); and (3) that the plaintiffs "had the District Court's *explicit invitation to proceed.*"(*Id.*, at 10)

The actual record shows no such "grant" and "invitation":

> "THE COURT: All you want me to do is keep an open mind and read the cases, is that what you are saying?
>
> "MR. ALIOTO: That's all, if your Honor please.
>
> "THE COURT: Yes, my mind is opened. It is not vacant but it is open.
>
> "MR. SEGAL: But it has in it a partial summary judgment.
>
> "THE COURT: Anything else?"
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> (Appendix on Appeal at pp. 129-30.)

A summary judgment had been entered on this issue against plaintiffs pursuant to Rule 56 of the Federal Rules

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in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act." (Citations omitted)

Since the Court's opinion in *Yellow Cab*, this principle has been continuously reaffirmed. *See, e.g. Schine Chain Theatres v. United States*, 334 U.S. 110, 116 (1948); *Kiefer-Stewart Co. v. Joseph Seagram & Sons*, 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); and *Perma Life Mufflers, Inc. v. International Parts*, 392 U.S. 134, 141 (1968).

of Civil Procedure. That judgment had not been vacated. The order granting summary judgment became an appealable issue with the entry of the final judgment. That issue was timely raised on appeal to the Second Circuit Court of Appeals. The issue was not decided by the Court of Appeals. Petitioners submit that this Court exercise its inherent administrative power to remand this issue to the District Court for further proceedings and, if appropriate, trial.

CONCLUSION

Because the trucking industry has such an enormous impact upon the social and political, as well as the economic well-being of the United States, and because the actual and potential competition of local, independent truckers acts as a check and balance against the possibility that unfettered control of the entire industry may one day be placed solely in the hands of a few major trucking companies, the issues raised by this appeal have a vital importance that extends well beyond the individual plaintiffs in this case and touches and has an influence upon practically every citizen of the United States.

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Second Circuit reversed.

Dated: San Francisco, California
September 1, 1981.

Respectfully submitted,

JOSEPH M. ALIOTO
LAWRENCE G. PAPALE
ALIOTO & ALIOTO
Attorneys for Petitioners

Appendix A

United States Court of Appeals
For the Second Circuit

No. 534—September Term, 1980

Argued: March 16, 1981

Decided: June 3, 1981

Docket No. 80-7727

Broadway Delivery Corp., et al.,
Plaintiffs-Appellants,

vs.

United Parcel Service of America, Inc., et al.,
Defendants-Appellees.

Before: LUMBARD and NEWMAN, *Circuit Judges*, and TENNEY,* *District Judge*

Appeal from a judgment of the District Court for the Southern District of New York (Kevin T. Duffy, Judge) dismissing, after a jury trial, an antitrust complaint for treble damages, the plaintiffs-appellants challenging primarily the District Court's jury instruction that the defendants could not be found to have monopolized the

*The Honorable Charles H. Tenney of the United States District Court for the Southern District of New York, sitting by designation.

relevant market urged by the plaintiffs unless the defendants' share of that market was at least 50%.

Judgment affirmed.

Joseph M. Alioto, San Francisco, Ca. (Lawrence G. Papale, Alioto & Alioto, San Francisco, Ca., and Elliot L. Schaeffer, Schaeffer, Schaeffer & Sands, New York, N.Y., on the brief), for appellants.

Irving R. Segal, Philadelphia, Pa. (Dennis R. Suplee, Arlene Fickler, Diana S. Donaldson, Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., Proskauer Rose Goetz & Mendelsohn, New York, N.Y., on the brief), for appellees.

NEWMAN, *Circuit Judge:*

This is an appeal from a judgment of the District Court for the Southern District of New York (Kevin T. Duffy, Judge) dismissing, after a jury trial, a complaint for treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). The suit was brought by various firms that transport packages in the New York metropolitan area against United Parcel Service of America, Inc. (UPSA) and its wholly-owned operating subsidiary in the Northeast, United Parcel Service, Inc. (New York) (UPSNY). The plaintiffs charged that from 1960 to 1975 the defendants conspired to monopolize, and monopolized or attempted to monopolize the pickup and delivery of small packages sent by wholesalers in the New York garment district, in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976). The § 1 claim was disposed of by summary judgment on the basis of the defendants' unopposed showing that during the relevant period they conducted their affairs and held themselves out as a single firm, incapable of conspiring with itself in violation of § 1. The § 2 claims were tried to a jury, which returned a verdict for the defendants. On appeal, the plaintiffs-appellants challenge primarily the District Court's rejection of their § 1 claim, and the Court's jury instruction that they could not prevail on their § 2 monopolization claim unless they proved that during the relevant period the defendants controlled at least 50% of the relevant market.[1] We conclude that the plaintiffs abandoned their

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[1]The plaintiffs also challenge the District Court's refusal to allow them to recount statements made to them by certain garment manufacturers concerning the reasons their customers had given

§ 1 claim and that the challenged jury instruction was erroneous but harmless error in light of the plaintiffs' failure to present a *prima facie* case of a § 2 monopolization violation. Our disposition of these issues moots the other claims of error, and we therefore affirm.

FACTUAL BACKGROUND

The plaintiffs transport goods by motor vehicle in and around what is known in the trade as the New York commercial zone, an area encompassing New York City and parts of northern New Jersey, which is exempt from regulation by the Interstate Commerce Commission and the New York State Department of Transportation. Most of the plaintiffs limit their activities to carrying merchandise from garment manufacturers in the commercial zone to retail stores in the commercial zone or to freight consolidators and post offices for re-delivery to retail stores throughout the United States. The plaintiffs who restrict their activities to the unregulated commercial zone are not required to have ICC operating rights, and many have none. Like anyone with a truck who wishes to engage in the transportation business in this area, these plaintiffs are free to pick up and deliver, as often as they wish, as many packages of any size and weight as they are physically able to carry, at any rate that the market will bear.

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them for preferring to have their orders shipped by the defendants. The plaintiffs offered this hearsay testimony to prove that the manufacturers' customers preferred the defendants because of their lower rates. Finally, the plaintiffs challenge the Court's admission in connection with the issue of damages of a defense exhibit showing that from 1970 to 1975 the volume of small packages carried by at least one of the plaintiffs actually increased.

The defendant UPSA is a Delaware corporation owning all the stock of defendant UPSNY, a New York corporation, and nondefendant United Parcel Service, Inc. (Ohio), an Ohio corporation (UPSO). The UPS subsidiaries transport packages in interstate commerce. UPSNY operates in thirteen Northeastern states, including the New York commercial zone; UPSO operates throughout the rest of the forty-eight contiguous states. Although separately incorporated, the subsidiaries operate cooperatively under a management agreement with UPSA to provide a unified transportation service for shippers throughout the country. During the relevant period, the management agreement provided that UPSA would supply the subsidiaries with a full range of management services in exchange for 4.5% of their gross receipts plus 50% of their net profits. The agreement further provided that UPSA would indemnify each subsidiary against operating losses it sustained in any year in which it followed UPSA's advice and recommendations.

Unlike the plaintiffs who restrict their activities to the commercial zone, the UPS subsidiaries operate under the jurisdiction of the ICC. During the relevant period, their ICC operating certificates prohibited them from carrying a package weighing more than 50 pounds or measuring more than 108 inches in length and girth combined. The certificates also prohibited them from transporting from a single shipper to a single consignee in any one day packages having an aggregate weight of more than 100 pounds. The rates charged by the UPS subsidiaries, contained in tariffs filed with the ICC, are modeled after and closely parallel the rates charged by the United States Postal

Service, the UPS organization's principal competitor. The UPS rates depend on the weight of the package and the distance to be traveled and are uniform for shippers throughout the country.

The record on appeal sheds little additional light on the nature of the market in which the parties conduct their operations. The plaintiffs contend that they established a relevant service market consisting of the pickup and delivery of wholesale packages weighing less than 50 pounds, and a relevant geographic market consisting of one of the basic administrative and operating units of the UPS organization, namely, the "Metro New York District," an area consisting in large part of the New York commercial zone. The defendants contend that the plaintiffs' definition of the relevant service market is too narrow in that it excludes some of the plaintiffs themselves, for example, a freight consolidator, who neither picks up nor delivers any packages. The defendants also challenge the plaintiffs' definition of the relevant geographic market, noting that the UPS companies operated during the period in question on a nationwide basis, that the Postal Service also operated nationwide, that much of the merchandise carried locally by the plaintiffs was eventually delivered to points throughout the United States, and that some of the plaintiffs carried merchandise to and from points outside the Metro New York District. On our view of the case, it is unnecessary to resolve the question whether the evidence was sufficient to establish the service and geographic markets urged by the plaintiffs. For purposes of this appeal, we will assume that the relevant

service and geographic markets are the ones claimed by the plaintiffs.

How the parties fared in the relevant market is an issue of some uncertainty. The plaintiffs alleged in their complaint that UPSNY's share of the relevant market steadily increased throughout the relevant period due to, among other exclusionary practices, below-cost pricing subsidized by UPSA, and that UPSNY eventually acquired more than a 50% share of the relevant market. The plaintiffs' evidence established that UPSNY's traffic tripled during the relevant period and that its revenues increased sevenfold. But the plaintiffs presented no evidence of UPSNY's market share at any time during the period in question. To support their claim that the defendants had engaged in predatory pricing, the plaintiffs relied on summaries of UPSNY's operations prepared by the defendants for internal purposes, and on the record of the payments the defendants made to each other under their management agreement. The plaintiffs interpreted the operating summaries as proof that UPSNY had consistently operated at a loss. However, the defendants' expert in cost accounting testified without rebuttal that the summaries were not only ill-suited for the purpose of showing the profitability of UPSNY's operations, but that, when the figures were properly adjusted, they showed that UPSNY made substantial profits in most years. Losses occurred only in 1963, soon after UPSNY began operating in the relevant market, and in those years in which UPSNY was beset by major strikes. The record of the defendants' payments to each other showed that during the relevant period UPSA collected

from UPSNY a total of over $178 million and indemnified it against losses totaling $37.6 million.

DISCUSSION

A. The § 1 Claim

The plaintiffs' § 1 claim was directed primarily at the indemnification provision of the defendants' management agreement. The plaintiffs contended that this provision had the purpose and effect of unreasonably restraining competition in the relevant market by enabling UPSA to use the profits earned by UPSO to subsidize predatory pricing by UPSNY. Following three years of pretrial proceedings, the defendants moved for partial summary judgment on the § 1 claim, contending on the basis of affidavits and deposition testimony that the agreement among the UPS entities was outside the purview of § 1 because they had operated at all relevant times as a single enterprise. The plaintiffs opposed the motion on the ground that the defendants had operated independently and requested an opportunity to engage in further discovery to elicit proof to support their claim. The District Court ruled that the defendants' capacity to conspire with each other in violation of § 1 was an issue of fact. Though the defendants' factual showing was unrebutted, the Court continued the motion for sixty days to allow the plaintiffs further opportunity to oppose the motion. The Court warned the plaintiffs that unless they submitted appropriate proof within the sixty-day period, their § 1 claim would be dismissed. The plaintiffs never submitted the required proof, despite several additional extensions of time totaling more than

six months, and the defendants' motion was eventually granted.

At a pretrial conference one year later, the plaintiffs' new counsel inquired whether the Court would be willing to submit the § 1 claim to the jury in the event the plaintiffs presented evidence demonstrating that the defendants had entered into an agreement prohibited by § 1. Judge Duffy replied that, despite the order dismissing the § 1 claim (which remained subject to revision, Fed. R. Civ. P. 54(b)), he had an open mind on the matter and was willing to permit the plaintiffs to attempt to prove the elements of their § 1 claim. Nevertheless, the plaintiffs failed to press the § 1 claim before the jury, requested no jury instruction on the claim, and voiced no objection when no § 1 instruction was given.

Whether the applicability of the intracorporate conspiracy doctrine is an issue of law or fact, a question that continues to divide the other circuits,[2] we agree with the defendants that the plaintiffs abandoned their § 1 claim when they failed to pursue it at trial. The District Court's grant of the plaintiffs' request to litigate the claim before the jury afforded them a full opportunity to secure revi-

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[2]*Compare Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978) (issue of law), *and H & B Equipment Co., Inc. v. International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978) (same), *with Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (issue of fact); *Ogilvie v. Fotomat Corp.*, ... F.2d ..., 1980-81 Trade Cases (CCH) ¶ 63,817 (8th Cir. 1981) (same) *and Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617-18 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980) (same).

sion of the order granting the partial summary judgment prior to the entry of any final judgment. The plaintiffs had more than the procedural possibility of revision contemplated by Rule 54(b); they had the District Court's explicit invitation to proceed. Their appeal from the dismissal of their claim is therefore no different from prior appeals challenging the rejection of claims and defenses that were pleaded but not properly pursued in the trial court; in such cases an appellate court will not relieve a party of the effect of its procedural default, except in the most extraordinary circumstances to prevent a miscarriage of justice. *See Stanspec Corp. v. Jelco Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972); *King v. Stevenson*, 445 F.2d 565, 571 (7th Cir. 1971); *Evans v. S.J. Groves & Sons Co.*, 315 F.2d 335, 341 (2d Cir. 1963). No such circumstances exist here.

B. The § 2 Monopolization Claim

In instructing the jury on the plaintiffs' § 2 monopolization claim, the District Court explained, in traditional language, that the defendants must be shown to have willfully acquired or maintained monopoly power—the power to control prices or exclude competition—in the relevant market. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The jury was then told to determine the defendants' share of the relevant market in deciding whether the defendants possessed monopoly power. If the jury agreed with the plaintiffs' market definition, the defendants' market share was to be determined by calculating the percentage of all the small wholesale packages

transported in the Metro New York District that were transported by the defendants. The plaintiffs do not challenge the instruction defining market share in terms of the percentage of packages carried, instead of the more traditional measure of the percentage of revenues received. Instead, their attack focuses on the following instruction concerning the significance of a market share below 50%: "If you find the defendants possessed less than 50% of the relevant market, you don't have to go any further on a monopolization claim. Possession of less than 50% of the market fails to established monopoly power." It is not entirely clear from the instructions how the jury was to use market share if it found that the share exceeded 50%. But there is no doubt that the jury was unequivocally told to reject the monopolization claim if the defendants' share was found to be less than 50%.

The significance of particular market shares has evoked varied comment in antitrust law. The cases have considered many different percentages, and the Courts' observations cannot readily be compared because they were made in contexts that ranged from a fact-finder's assessment of the evidence, *e.g., United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954), to a legal determination of the sufficiency of a claim, *e.g., Brager & Co., Inc. v. Leumi Securities Corp.*, 429 F. Supp. 1341 (S.D.N.Y. 1977). Several decisions cast doubt on whether monopoly power can be possessed by a company enjoying less than a 50% market share. In the early case of *United States v. United States Steel Corp.*, 451 U.S. 417 (1920), the Supreme Court stated that it was "certain" that the defendant had not achieved

a monopoly, reasoning that although "the power [it] attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them." *Id.* at 444. It has frequently been observed, moreover, that the leading cases upholding monopolization claims involved defendants who controlled well over half the relevant market, with market shares ranging from 70 to 100%. *See, e.g., Hiland Dairy Inc. v. Kroger Co.*, 402 F.2d 968, 974 n.6 (8th Cir. 1968) (collecting cases). And an occasional statement can be found labeling a 50% market share a "prerequisite for a finding of monopoly." *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969). In most instances, however, the courts seem to be assessing only the significance of the share possessed by a particular defendant in a particular market, rather than endeavoring to extrapolate a general rule. In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), for example, Judge Learned Hand considered Alcoa's share under three possible market definitions and thought it "doubtful" whether a share of 60-64%, yielded by one of the definitions, would constitute a monopoly. *Id.* at 424. It seems unlikely that Judge Hand was doubting that any defendant with a 60-64% share of any market, regardless of its structure, could ever be found to possess monopoly power. Even if his doubts ranged beyond the case he was considering, it is significant that he expressed a doubt, not a rule of preclusion.

In *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980), the case relied on by the District Court as authority for the challenged instruction, we held that a monopolization claim was prop-

erly dismissed on a motion for summary judgment despite evidence that at the beginning of the relevant period the defendant had a market share of 48.3%. But we did not affirm the defendant's judgment simply because 48.3% was less than 50%. Instead we assessed the significance of the defendant's share, specifically noting that the share had steadily declined to 33%. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 n.11 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (noting evidential significance of decline in market share). In *United States v. United Shoe Machinery Co., supra*, Judge Wyzanski, as the finder of fact, found, on the basis of all the evidence, that the defendant controlled markets in which its share exceeded 50%, but did not control other markets in which its share was less than 50%. *Id.* at 346. Similarly, in *Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976), the Court, in rejecting the sufficiency of a § 2 claim, noted that the defendant's market share did not exceed 60%, but also observed that there was no evidence of the shares of other principal competitors and, in general, insufficient evidence to support a conclusion that the defendant had monopoly power.

The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence. In *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), the Supreme Court recognized that exclusive focus on market share percentages can produce a distorted picture of market power because "the relative effect of percentage command of a market varies with the setting in which that factor is placed." *Id.*

at 528. The Court said that a true picture emerges only from consideration of additional market characteristics, among them, the strength of the competition, the probable development of the industry, and consumer demand. *Id.* at 527. In more recent decisions in the merger context, the Court has reaffirmed its unwillingness to base market power determinations simply on market share data, preferring to treat market share as strong, perhaps presumptive, evidence of the presence or absence of market power, subject to bolstering or rebuttal by other evidence. *See, e.g., United States v. Citizens & Southern National Bank,* 422 U.S. 86, 120 (1975); *United States v. Marine Bancorporation,* 418 U.S. 602, 631 (1974); *United States v. General Dynamics Corp.,* 415 U.S. 486, 497-98 (1974). This approach was followed recently by the Ninth Circuit when it reversed a ruling that an allegation of a market share of 65% was an insufficient pleading of monopoly power, *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,* 627 F.2d 919, 924-25 (9th Cir. 1980), *cert. denied,* 101 S. Ct. 1369 (1981), and by several trial courts which recognized, in denying motions to dismiss claims or grant summary judgment, that a particular market share is not inevitably necessary for a firm to be able to control prices or exclude competition. *See Brager & Co., Inc. v. Leumi Securities Corp., supra,* 429 F. Supp. at 1347 (claim alleging 60% share); *American Standard, Inc. v. Bendix Corp.,* 487 F. Supp. 265, 269 (W.D. Miss. 1980) (no percentage allegation); *Fox Chemical Co. v. Amsoil, Inc.,* 445 F. Supp. 1355, 1360 (D. Minn. 1978) (same). *See generally* 4 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 908-15 (1978); W. Landes

& R. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981).

We do not doubt the significance of market share evidence as an indicator of either the presence or absence of monopoly power. As the cases and commentators have cautioned, however, the true significance of market share data can be determined only after careful analysis of the particular market. Unfortunately, that type of analysis is more congenial to the economist's blackboard than to the courtroom, especially when an antitrust case is tried to a jury. Formulas can express the pertinent relationships between market power, market share, and demand and supply elasticities, *e.g.*, W. Landes & R. Posner, *supra*, at 945 (equation 3), but the data required for sophisticated analysis of a particular market are not always available, and their comprehension by jurors is uncertain at best. Endeavoring to apply the legal standards of the antitrust laws in the light of modern economics requires trial judges to assess carefully whether the market power evidence creates a fair jury issue of monopoly power and, if so, to afford the jury helpful guidance in resolving the issue.

In ruling on a motion for summary judgment or directed verdict, a trial judge should recognize that determining the existence of monopoly power often does not require resolution of the sharp factual disputes associated with such issues as agreement, intent, preparedness, or damages, issues frequently involving credibility disputes that ordinarily require jury resolution. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Undisputed facts may enable the trial judge to rule on a

claim of monopoly power as a matter of law, employing economic analysis to the extent the data permit. In making such rulings, the trial judge may properly attach significance to market share evidence. Depending on what the undisputed evidence shows concerning a defendant's market share, the structure of a market, and the activities of the defendant and others within the market, a particular record may permit no reasonable inference other than that the defendant lacks monopoly power. Such a conclusion may be reached if the defendant's share is less than 50%, or even somewhat above that figure, *and* the record contains no significant evidence concerning the market structure to show that the defendant's share of that market gives it monopoly power. In the absence of such evidence and any other evidence from which the power to control prices or exclude competition can reasonably be inferred, a monopolization claim may be withdrawn from a jury.

If, however, the record contains evidence framing a fair jury question as to whether a defendant has monopoly power, the court should assist the jurors in assessing the significance of market share and of other factors bearing on monopoly power. It usually will be helpful to advise a jury that the higher a market share, the stronger is the inference of monopoly power. And a jury can usefully be given some explanation concerning the relationship between market share and market structure to make it clear that, although a particular share might enable a company to have monopoly power in one market, the same share might not enable another company to have monopoly power in a different market with different market characteristics.

The extent to which market characteristics should be explained to the jury in a particular case will vary with the nature of the underlying facts and the expert testimony. Sometimes, but not inevitably, it will be useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power. But when the evidence presents a fair jury issue of monopoly power, the jury should not be told that it must find monopoly power lacking below a specified share or existing above a specified share. Of course, cases may arise where the parties' dispute concerning market definition creates a jury issue on monopoly power only if one side's market definition, usually the plaintiff's, is established. In such circumstances a jury can be instructed to find for the defendant if the plaintiff fails to prove its definition of the relevant market. Alternatively, a jury could be instructed to answer a special interrogatory concerning market definition, which would permit the trial judge to direct a verdict for the defendant if the plaintiff failed to prevail on its market definition.[3] On the other hand, in some cases, there may be a genuine issue as to monopoly power in the market as defined by either party, in which event the market share under either definition would not be conclusive. However the instruction is phrased, it should not deflect the jury's attention from indicia of monopoly power other than market share.

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[3]In this case, though there was some dispute as to market definition, the jury was given no choice between conflicting claims of market share because there was no data from either side concerning the defendant's market share under either side's view of the relevant market.

See United States v. E.I. du Pont de Nemours & Co., supra; Juneau Square Corp. v. First National Bank of Wisconsin, 624 F.2d 798, 813 (7th Cir.), *cert. denied,* 101 S. Ct. 571 (1980); *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207, 1219 (9th Cir. 1977); *Jack Winter, Inc. v. Koratron Corp., Inc.,* 375 F. Supp. 1, 68-69 (N.D. Cal. 1974). *See generally* 2 P. Areeda & D. Turner, *supra,* ¶¶ 507-16 (1978).

In light of these considerations, the District Court's instruction, precluding a finding of monopoly power if the defendants' market share was less than 50%, was erroneous for two reasons. First, with the record devoid of any evidence of UPSNY's percentage of the relevant market, whether as defined by the plaintiffs or the defendants, the jury could not possibly apply an instruction to attach conclusive significance to a share below a specified percentage. More fundamentally, even if from all the evidence the jury might somehow have inferred that UPSNY carried less than half the packages in the New York commercial zone, that fact would not automatically preclude a finding of monopoly power by a jury entitled to assess monopoly power on the record as a whole. In this case, however, the challenged instruction does not require reversal because the plaintiffs' evidence was insufficient to permit a reasonable jury to find that UPSNY possessed monopoly power.

When the existence of significant market power is an essential element of a claim for treble damages, the plaintiff's market power evidence, whether consisting of the defendant's market share or of specific conduct indicating the defendant's power to control prices or exclude competition, must be substantial. *See Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 698, 696-97 & n.6

(1962); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 430 (7th Cir. 1980); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 733 (9th Cir. 1979). In *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977), we noted that to prove a defendant's possession of monopoly power ordinarily requires proof of the "approximate share" of the market controlled by the defendant. *Id.* at 1030. Yet, in this case, the plaintiffs presented no market share data, conceding to the jury that they did not have "any percentages." We do not suggest that evidence of market share is invariably a requirement of a monopolization claim, but when such a traditional form of proof is lacking, the plaintiff must produce unambiguous evidence that the defendant has the power to control prices or exclude competition. Isolated instances of anti-competitive conduct will rarely suffice to show that a defendant's market power is substantial enough to be monopoly power. Such acts may show what power a defendant is seeking, but not necessarily what power it has. *See* P. Areeda & D. Turner, *supra*, ¶ 513.

Lacking market share data, the plaintiffs relied primarily on evidence purporting to show that UPSNY had consistently operated below cost while also realizing steady gains in its volume of traffic. No case supports the view that proof of below-cost pricing, without proof of market structure, is sufficient to establish the market power component of a monopolization claim. It is conceivable that predatory pricing persisting over an extended period could support an inference of monopoly power on the theory that sustaining substantial losses will at some point destroy

either the defendant or its competition. But because the social costs of failing to distinguish between predatory pricing and competitive pricing are frequently high. *see* P. Joskow & A. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213, 223-25 (1979), sounder analysis permits examination of a defendant's pricing behavior only after a plaintiff has produced some evidence of a defendant's monopoly power in the relevant market, *id*, at 242-62.

In this case, whatever inference might theoretically be drawn from persistent below-cost pricing, the evidence, considered as a whole, was clearly insufficient to establish a jury issue as to whether the defendants possessed monopoly power. Undisputed evidence showed that the defendants did not have the power to control prices. The defendants' rates were subject to ICC approval and could not realistically be raised substantially without the defendants losing business to their principal competitor, the Postal Service. Undisputed evidence further showed that the defendants lacked the power to exclude competition. The Postal Service could not be excluded by the defendants, and entry into the market was open to anyone willing to make the modest investment required to engage in a local delivery service.

Moreover, the plaintiffs' evidence of predatory pricing was in itself seriously deficient. Whether or not one agrees that proof of pricing below marginal or average variable cost is essential to a predatory pricing claim,[4] the plaintiffs

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[4]*Compare Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) (failure to show that

could not demonstrate price predation by the defendants without proof permitting a careful assessment of the relationship between the defendants' prices and costs. *See generally* 3 P. Areeda & D. Turner, *supra*, ¶¶ 710-11. The plaintiffs' proof did not permit a reasonable fact-finder to make this assessment. The summaries of UPSNY's operations lump all its traffic figures in one category, all its revenues in another, and all its profits in a third. It may be that an expert in cost accounting could have discerned in these gross figures a basis for the required analysis, but the plaintiffs presented no such testimony. Indeed, the plaintiffs did not even attempt to counter the testimony of the defendants' expert that the summaries, properly adjusted, show that UPSNY earned substantial profits in all non-strike years. The record of the defendants' payments to each other under the management agreement undercut the plaintiffs' predatory pricing claim, showing that UPSNY earned millions of dollars of gross revenues and net profits during the relevant period.

At most, the plaintiff's evidence established that UPSNY's prices were lower than the prices charged by some of the plaintiffs. It is questionable whether uniform nationwide rates that are subject to approval by one government

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defendant's prices were below marginal or average variable cost constituted failure as a matter of law to present a *prima facie* case of predatory pricing), *and International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (same), *with Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, *supra*, 615 F.2d at 423-33 (pricing below marginal or average variable cost relevant but not essential), *and Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) (same).

agency and to competitive pressure by another can ever be considered predatory merely because the rate schedule yields prices in one area that are lower than the prices charged by local competitors. But the plaintiffs could not prevail on their claim in any event unless they showed that the defendants' prices were unrelated to competition on the merits. Even if, as the plaintiffs contend, the defendants' uniform rates were made possible by using UPSO's profits to subsidize UPSNY's operations, the plaintiffs did not contest the defendants' showing that their nationwide rate structure was calculated to be competitive with the rate structure of the Postal Service, and that the uniformity of their rates throughout the forty-eight states made their service more attractive to shippers.[8]

Considering all these factors in light of prior cases upholding the dismissal of predatory pricing claims, we have no difficulty concluding that the plaintiffs' evidence of a monopolization violation was insufficient. *See, e.g., Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., supra*, 615 F.2d at 430-34; *California Computer Products, Inc. v. International Business Machines Corp., supra*, 613 F.2d at 739-43; *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 855-59 (9th Cir. 1977), *cert. denied*, 439

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[8]The plaintiffs urge that the use of UPSO's profits to subsidize UPSNY's operations violated § 2 because UPSO had a monopoly in its geographic market. We have ruled that the use of monopoly power in one market to gain a competitive advantage in another violates § 2, even in the absence of an attempt to monopolize the second market. *Berkey Photo, Inc. v. Eastman Kodak Co., supra*, 603 F.2d at 275-76. But the plaintiffs failed to present substantial evidence that UPSO had monopoly power in its geographic market, or that any of the UPS companies had a monopoly in any market.

U.S. 829 (1978); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1357-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). The plaintiffs do not challenge the dismissal of their attempted monopolization claim, to which the erroneous 50% market share instruction did not apply. That claim was properly rejected by the jury, and we therefore need not consider whether it was appropriate for submission to the jury.[6]

Judgment affirmed.

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[6]Even though we conclude that the trial evidence was insufficient to frame a jury issue on the monopolization claim, it still would have been prudent for the District Judge, having completed the trial, to submit that claim to the jury so that a verdict could be obtained, a practice that will frequently avoid the need for a retrial.

Appendix B

United States District Court
Southern District of New York

75 Civil 1280 (KTD)

Broadway Delivery Corp., et al.,
Plaintiffs,

against

United Parcel Service of America, Inc., et al.,
Defendants.

[Filed July 22, 1980]

JUDGMENT

The issues in the above entitled action having been brought on regularly for trial before the Honorable Kevin T. Duffy, U.S.D.J., and a jury, on July 2, 1980, and at the conclusion of evidence the jury having returned a verdict in favor of the defendants, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
July 22, 1980

Clerk

Opposition

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-445

IN THE

Supreme Court of the United States

October Term, 1981

BROADWAY DELIVERY CORP., et al.,
Petitioners,

v.

UNITED PARCEL SERVICE OF AMERICA, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF IN OPPOSITION.

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QUESTIONS PRESENTED.

1. In a private, treble-damage, antitrust action based on alleged violations of the Sherman Act in which the jury rendered a verdict for the defendants, did the plaintiffs adduce sufficient proof to get their claim of actual monopolization to the jury?

2. If the answer to the preceding question is in the affirmative, did the trial judge correctly instruct the jury on the actual monopolization claim?

3. Did the plaintiffs abandon their claim that Section 1 of the Sherman Act had been violated when they offered no proof at trial to support that claim, requested no Section 1 instructions and did not object to the trial judge's failure to give such instructions, even though the trial judge had stated at a pretrial conference that he was willing to examine the Section 1 claim in light of the evidence adduced at the trial and that he would not treat his previous entry of a partial summary judgment for the defendants on the Section 1 claim as closing the book on the subject?

4. If the answer to the preceding question is in the negative, did the trial judge properly enter partial summary judgment against the plaintiffs on their Section 1 claim?

Pursuant to Rule 28.1, respondents state that they are United Parcel Service of America, Inc. and its wholly-owned subsidiary, United Parcel Service, Inc. (New York). Other than wholly-owned subsidiaries, respondents have no affiliates or subsidiaries except for Service Plants Corporation, a company whose stock is held in trust for the benefit of the shareholders of United Parcel Service of America, Inc.

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STATEMENT.

A. Introduction.

By their petition for a writ of certiorari, the plaintiffs in a private, treble-damage, antitrust action are seeking to have this Court review a unanimous decision of a panel of the United States Court of Appeals for the Second Circuit which affirmed a judgment for the defendants that had been entered after a six-week trial on liability and a jury verdict for the defendants. The case had been submitted to the jury on claims of actual monopolization and attempted monopolization under Section 2 of the Sherman Act, the major thrust of petitioners' proof having been directed to the "attempt to monopolize" claim.

The "attempt to monopolize" claim was submitted to the jury on instructions that petitioners did not challenge, either in the trial court or on appeal; indeed, counsel for petitioners told the trial judge that his instructions to the jury "were certainly the best instructions that I have heard in all the antitrust cases I have had" (App. 218).[1]

The only portion of the jury charge to which petitioners objected was an instruction relating to the "actual monopolization" claim (App. 218). Contrary to what we believe to be the law, the Court of Appeals agreed with petitioners' objection to that particular instruction; however, the court held that petitioners had not introduced sufficient evidence of monopoly power to get their "actual monopolization" claim to a jury and, therefore, that the challenged instruction was harmless error (Pet. App. A10-A22).

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1. The designation of "App." refers to the Appendix in the Court of Appeals.

"App. Ex." refers to the Appendix of Exhibits in that court.

"Tr." refers to the trial transcript.

Finally, although petitioners made no effort whatsoever to prove their Section 1 claim at trial, they ask this Court to review the Court of Appeals' holding that the Section 1 claim had been abandoned (Pet. App. A8-A10) and to "exercise its inherent administrative power to remand this issue to the District Court for further proceedings and, if appropriate, trial" (Pet. 28).

B. Procedural History of the Litigation.

Petitioners commenced this lawsuit in March 1975 in the United States District Court for the Southern District of New York against United Parcel Service of America, Inc. and its wholly-owned subsidiary, United Parcel Service, Inc. (New York), the two respondents. Petitioners charged that respondents had conspired to restrain trade, had conspired to monopolize, had attempted to monopolize, and had actually monopolized the pickup and delivery of small packages in the New York garment district in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2.

In January 1978, after almost three years of pretrial discovery, respondents moved for partial summary judgment on the Section 1 claim. That motion was supported by exhibits, affidavits and excerpts from deposition testimony, all of which demonstrated that respondents and their alleged co-conspirator, United Parcel Service, Inc. (Ohio), were not competitors, were commonly owned and controlled, and were operated as a single economic unit (known to the general public as "United Parcel Service" or "UPS") which rendered a uniform nationwide service at uniform rates (App. 36-100). Petitioners submitted no affidavits or other proof in opposition to the motion.

In May 1978, after briefs had been submitted by both sides on the Section 1 motion, the trial judge (Duffy, J.)

issued a Memorandum and Order (App. 118-23) in which he indicated general agreement with respondents' legal arguments but granted petitioners an additional 60 days within which to take discovery and submit any proof that would show a genuine issue of material fact in this area. Petitioners were later given several additional extensions of time, but still they submitted nothing. Finally, on April 27, 1979, the trial judge issued an Order granting partial summary judgment to respondents on the Section 1 claim (App. 116-17).

At a pretrial conference held in May 1980, petitioners' trial counsel asked the trial judge to look at the Section 1 claim in light of the evidence that would be adduced at the trial and not to treat Section 1 as a closed book (App. 126-29). The trial judge responded that he would keep an open mind on the subject (App. 129).

This case was then tried before Judge Duffy and a jury from June 2 through July 9, 1980, a total of almost six weeks. At no time during the trial did petitioners offer any proof on the Section 1 claim. They did not request any jury instruction on Section 1. And they did not object to the absence of a Section 1 instruction in the judge's charge to the jury.

At the close of all the evidence and before the jury was charged, respondents moved for a directed verdict (and filed a memorandum in support of that motion). The trial judge took the motion under advisement and, as was his right under F. R. Civ. P. 50, submitted the case to the jury without ruling on the motion (Tr. 2937-38).

On July 18, 1980, after seven days of deliberation, the jury returned a unanimous verdict in favor of respondents on liability, with the jurors specifically declaring their conclusion that petitioners had not proved that respondents had violated the antitrust laws (App. 219-20).

After petitioners' post-trial motions were denied, they appealed to the Court of Appeals for the Second Circuit claiming (1) that the trial judge had given an erroneous instruction to the jury on the actual monopolization claim, (2) that the trial judge had erred in granting respondents' motion for partial summary judgment on the Section 1 claim, (3) that respondents were guilty of an antitrust violation as a matter of law because of their alleged "subsidization" of losses in one operation with profits from another, (4) that the trial judge had erred in refusing to permit petitioners to testify as to what their customers told them, and (5) that the trial judge had erred in admitting into evidence a survey of the business of one of the 26 petitioners.

On June 3, 1981, the Court of Appeals affirmed. In an opinion (651 F.2d 122, Pet. App. A3-A23) for a unanimous panel consisting of Circuit Judge Lumbard, District Judge Tenney and himself, Circuit Judge Newman held that petitioners had abandoned their Section 1 claim (Pet. App. A8-A10), and that the challenged instruction on the actual monopolization claim was erroneous (Pet. App. A10-A19) but that it was harmless error in light of petitioners' failure of proof (Pet. App. A19-A22). Petitioners' other claims of error were dismissed as moot in the circumstances (Pet. App. A3-A4).

C. The Facts.

1. The Petitioners.

Petitioners are 26 companies engaged in motor transportation of articles in the New York Metropolitan area. During the relevant period (1960-1975), many of the petitioners operated exclusively in what is known as the New York commercial zone, an area encompassing New

York City and parts of northern New Jersey which is exempt from regulation by the Interstate Commerce Commission and the New York State Department of Transportation (Tr. 112, 251-52). Those petitioners restricting their transportation activities to the unregulated New York commercial zone were not required to have operating rights. Hundreds of other motor carriers also operated in the New York commercial zone (Tr. 898, 902, 1769, 1901).

Most of the petitioners limited their transportation activities to the carrying of merchandise from garment manufacturers in the New York commercial zone to freight consolidators [2] or post offices, for ultimate distribution to retail stores throughout the country (Tr. 929, 1198, 1430, 1631, 1753, 1804, 1916, 2130).[3]

The packages carried by most of the petitioners ranged in weight from one pound to 100 pounds or more (Tr. 1374, 1471, 1767-68, App. 187-88). Petitioners generally based their rates on the size of the packages they carried—using the categories "small," "medium," and "large"—rather than on the weight of the shipment (Tr. 976-78, 1258-60, 1494-95, 1825-26, 2092).

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2. A freight consolidator is a middleman who is selected and paid by a store to act for it when the store orders merchandise from a number of suppliers in a particular geographic area (Tr. 613, 2010). The store directs its suppliers to send their merchandise to the consolidator and the latter collects the merchandise into a bulk shipment and sends it to the store via an interstate motor carrier (Tr. 614, 2010). To get their merchandise to the consolidator, the suppliers typically would use local truckers, such as petitioners (Tr. 614-15).

3. Although most of the petitioners carried merchandise to consolidators in the New York commercial zone, some of them also made deliveries directly to retail stores located within that zone (Tr. 1575, 1602, 1881-82).

2. The Respondents.

Respondent United Parcel Service of America, Inc. ("UPSA") is a Delaware corporation that owns all of the stock of the other respondent, United Parcel Service, Inc. (New York) ("UPSNY") and of United Parcel Service, Inc. (Ohio) ("UPSO") which is not a party to this litigation. The stock of UPSA is owned almost exclusively by employees and former employees of UPS, or their heirs and estates (Tr. 97-98).

UPS engages in the business of transporting small packages throughout the United States. UPSNY is the UPS operating company in the 13 northeastern states (including New York) and UPSO is the UPS operating company in the remainder of the 48 contiguous states (Tr. 2478-79, D. Ex. 1102).

Although they are separately incorporated, UPSNY and UPSO operate cooperatively under a management agreement with UPSA to provide a unified and uniform transportation service at uniform rates throughout the country. Under the management agreement, UPSA supplied its subsidiaries with a wide variety of management services—as, for example, engineering, personnel, legal, and purchasing. The subsidiaries, in turn, remitted a percentage of their gross receipts and, for a time, a percentage of their net profits to UPSA. Additionally, having undertaken to manage the subsidiaries, UPSA was, for a time, obliged to reimburse them for any operating losses (Tr. 344-46, 532-33).

Until the 1950s, UPS' primary business consisted of making deliveries for retail stores to the homes of their customers pursuant to individually negotiated contracts between UPS and each of the stores (Tr. 2463-65). As growth of that "retail" business began to slacken—largely as the result of war time restrictions and the development

of post-war shopping centers with large parking areas—UPS decided (in the early 1950s) to start a common carrier operation (sometimes referred to, in the early days, as a "wholesale" operation) which would provide a service similar to the parcel post service provided by the Post Office but with improved and additional service features (such as parcel pickup), at rates comparable to those of Parcel Post (Tr. 156-58, 2148-49, 2486-512).

UPS' common carrier operation in the northeastern area of the country was originally limited to unregulated commercial zones (Tr. 2473). In 1960, UPS obtained rights from the Interstate Commerce Commission ("ICC") authorizing UPS to operate interstate from an area around New York City to an area in northern New Jersey, New York, and the southern New England states, and from an area around Boston to the same area plus parts of Maine, New Hampshire, and Vermont (Tr. 2474-75). UPS obtained additional operating rights from the ICC from time to time thereafter. By 1974, UPS' operating rights were such that a shipper in New York City was able to ship a package via UPS to any point in the 48 contiguous states (Tr. 262-63, 2475-85).

UPS' primary competitor is, and always has been, Parcel Post (Tr. 1001, 1406, 1746-47, 1807-08, 1948-49, 2277-79). In addition, there are hundreds, probably thousands, of competitive carriers who operate in various parts of the United States (Tr. 487-89, 898).

At all relevant times, the ICC certificates under which UPS operated prohibited UPS (1) from carrying any package weighing more than 50 pounds or measuring more than 108 inches in length and girth combined, and (2) from transporting packages which, in the aggregate weighed more than 100 pounds from a single shipper to a single consignee on any one day (Tr. 2166, 2568). None of the petitioners was limited by any comparable restriction.

UPS' rates, all of which were contained in tariffs filed with the ICC (Tr. 249), were modeled upon and were closely parallel to those of Parcel Post (Tr. 2647). The package and poundage rates of UPS were uniform for shippers wherever located throughout the 48 contiguous states (Tr. 2173). UPS' rates depended upon the weight of the package and the distance it had to travel (Tr. 2173, 2557, D. Ex. 1088). The UPS distance zones were the same as those of Parcel Post (Tr. 100).

In addition to the package and poundage charges, the UPS rates also included a weekly charge ($2.00 in most parts of the country) for the service of having a UPS truck stop automatically each day at the shipper's place of business regardless of the volume of packages, or even if there were no packages to be picked up (Tr. 102-03, 247-49). In the New York area, UPS set the weekly service charge at $4.00 because, when UPS first started its common carrier operation in New York, it was concerned that traffic conditions there might cause the cost of getting to shippers' premises to be greater than it was elsewhere (Tr. 103). However, UPS' experience has been that its costs per package varied very little from one area to another and that the greater number of packages picked up per city block in the New York area compensated for any greater operating difficulties (Tr. 104-05).

3. Petitioners' Distorted Recitation of the "Material Facts."

In the petition for certiorari, the "material facts" are set forth (Pet. 7-18) in the fashion of a one-sided, closing argument to the jury. Petitioners ignore evidence contrary to their claims, and treat the jury verdict—which was rendered in respondents' favor—as if it did not exist.

Most significantly, petitioners boldly declare in their petition, as they did at the trial, that UPS was "subsidiz-

ing" losses in its Metropolitan New York operations with profits from other operations (Pet. 7-14, 21-26). Yet, although petitioners lost the jury verdict, they make no attempt whatever to deal with the very extensive trial evidence that their underlying premise was simply wrong.

In the first place, respondents presented evidence that the relevant geographic market is a national one. If the market is national, then there could be no "subsidization" since UPS' nationwide operations were concededly profitable (D. Ex. 2511).

Second, respondents demonstrated that UPS charged uniform rates on a national basis in order to compete with Parcel Post (Tr. 2294-95, 2300). In setting its rates, UPS took into account its overall costs, on a national basis, and found that there were no significant cost variations over large geographic areas (Tr. 104-06, 360, 2550-52, 2612-13). If UPS had permitted minor cost variations from one small area to another to be reflected in rate differences, the simplicity of UPS' rate system would have been destroyed, UPS' service would have been less attractive to shippers and consignees, and UPS would have been less competitive with Parcel Post (which had a uniform rate structure). In short, without uniform rates, UPS would not have been the attractive alternative to Parcel Post which it was intended to be and which it was in fact (Tr. 2173, 2261, 2549-50, 2551-52).

Third, respondents established that the UPS operations in the northeastern states covered by UPSNY, and in the New York metropolitan area in particular, were generally profitable (D. Ex. 2509, 2510, Tr. 480-82, 2196-98). Petitioners sought to show that those areas were not profitable by relying exclusively—and mistakenly—upon certain internal UPS reports that had been generated for internal management purposes and which were not designed to, and did not, show the results of operations in

the sense of a normal profit-and-loss statement (Tr. 130-32, 367-71, 471-73, 2359-65, 2184-85). In response to this claim, respondents presented the testimony of a partner in one of the national accounting firms who had impressive credentials as an expert in cost accounting (Tr. 2336-43). This independent accountant testified that the internal UPS reports did not accurately portray the profitability of the operations (Tr. 2359-65).

The principal problem—although not the only one—was that the UPS internal reports included as "expenses" the full amounts paid to affiliated UPS entities for management services and for rent (Tr. 545-46). The amounts paid included a profit to the affiliated UPS entities (Tr. 2359-62, 234-36). The independent accountant testified without contradiction—indeed with confirmation in the practices of some of the petitioners themselves (Tr. 650-52, 661-62, 1913-14)—that sound cost accounting principles require that, in determining the profitability of an enterprise, intercorporate profits be disregarded and that only the actual cost be treated as an expense (Tr. 2359-64). When one adjusts the intercorporate items to show only the actual cost to UPS (*i.e.*, disregarding that part of the expense which represented a profit to one of the UPS companies), it becomes clear that UPSNY made sizable profits in every year in the 1960-1975 period, except for 1962 and 1974 (D. Ex. 2510, Tr. 480-82, 2196-97, 2359-66); in 1962, and again in 1974, UPSNY suffered a major strike (Tr. 2541-47) and, thus could not reasonably be expected to make a profit in either year. Indeed, from 1960 to 1975, the profits of UPSNY totalled nearly $100 million (D. Ex. 2510). UPS' metropolitan New York operation was profitable in every year except 1963 (which was soon after UPS had started up its operations) and the years in which UPS had suffered strikes (D. Ex. 2509, Tr. 2197-98).

Additionally, the independent accountant testified that, since the UPS "retail" and "wholesale" operations were fully integrated operationally, it would be unsound for cost accounting purposes to separate them in determining profitability (Tr. 2367-71). Yet, without any support in the record for doing so, petitioners just blithely assert that UPS' "retail" and "wholesale" operations were separate and independent businesses and should be treated as such (Pet. 3-4, 10-11).

There was also testimony showing that, in other regards, the internal UPS reports did not accurately show all of the revenue and expenses incurred in the New York metropolitan area (Tr. 235-36, 255-56, 127-29).

Thus it was clear that the internal UPS reports could not be relied upon, as petitioners attempted to do, to show profit or loss in an operating sense.

Moreover, respondents also showed, through the testimony of the independent accountant, that the profit to UPSA on payments made to it by UPSNY *exceeded* the amounts paid to UPSNY as reimbursement (D. Ex. 2512, Tr. 2384-89).

Finally, in response to petitioners' claim that UPSA had unfairly "subsidized" UPSNY through cash advances, UPS company witnesses and the independent accountant testified that such advances are a form of contribution to capital, similar to purchases of stock or paid in capital, and have nothing to do with "subsidization" (Tr. 2433-34, 2452-54, 2555-56, 482-83, 333-35).

Notwithstanding petitioners' heavy reliance on the claim that UPS consistently lost money in the New York metropolitan area, they called no witnesses, expert or lay, to contradict the testimony of the independent accountant on the critical cost accounting aspects of the case.

ARGUMENT.

The petition for a writ of certiorari does not present any issue warranting review by this Court.

I.

The Court of Appeals' Holding That the Jury Instruction on the Actual Monopolization Claim Was Harmless Error Does Not Present Any Issue Warranting Review by This Court.

While petitioners choose to devote their "factual" recitation to a lengthy diatribe about predatory practices supposedly engaged in by UPS—leading up to what they colorfully describe as a "monopolistic arrogance" on UPS' part (Pet. 18)—nothing that petitioners say can overcome the fact that petitioners are *not* before this Court on an "attempt to monopolize" claim. Petitioners had a full and fair shot at the jury on their claim that respondents had attempted to monopolize the relevant market. And petitioners lost. Their "attempt to monopolize" claim was submitted to the jury on a clean record, with jury instructions to which petitioners did not object, and the jury rendered a verdict for respondents.

The *only* jury instruction that was challenged by petitioners was an instruction given by the trial court that related *solely* to the question of "actual monopolization." After charging the jury on the general principles—laid down in landmark cases like **United States v. E. I. duPont de Nemours & Co.**, 351 U. S. 377 (1956), and **United States v. Grinnell Corp.**, 384 U. S. 563 (1966)—to the effect that, in order to make out a claim of actual monopolization, a plaintiff is required to prove that the defendant possessed "monopoly power" in the relevant market, with "monopoly power" defined as the "power to control prices or exclude competition," the trial judge went on to tell

the jurors that they could not find that UPS possessed "monopoly power" if they found that UPS had a market share of less than 50% in the relevant market (App. 216-17). Petitioners objected (App. 218).[4]

This 50% instruction certainly had precedent to support it.[5] There is no case of which we are aware in which a verdict of actual monopolization has ever been sustained on proof of a market share of less than 50%. Nevertheless, the Court of Appeals for the Second Circuit held that the instruction was improper (Pet. App. A10-A19).

However, the Court of Appeals also held that, while the instruction was in error, the error was harmless because the claim of "actual monopolization" should never have been submitted to the jury in the first place (Pet. App. A19-A23). The court held that the record did not contain sufficient evidence that UPS had "monopoly

4. Petitioners' counsel said that he had "no objections" except "to the instruction of the Court with regard to the necessity of finding a percentage as an element rather than as circumstantial evidence of the existence of the power." (App. 218). He then said:

> "I would like to say that I have no other objections to any of the instructions and also on the record, I would like to say that I thought that they were certainly the best instructions that I have heard in all the antitrust cases I have had and the way they were delivered extemporaneously, I thought was certainly something that I would hope could be repeated in trials that I have in the future." (*Ibid.*)

5. See **United States v. United States Steel Corp.**, 251 U. S. 417, 444 (1920); **United States v. Aluminum Co. of America**, 148 F. 2d 416, 424 (2d Cir. 1945); **Hiland Dairy, Inc. v. Kroger Co.**, 402 F. 2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U. S. 961 (1969); **Cliff Food Stores, Inc. v. Kroger, Inc.**, 417 F. 2d 203, 207 n. 2 (5th Cir. 1969); **Holleb & Co. v. Produce Terminal Cold Storage Co.**, 532 F. 2d 29, 33 (7th Cir. 1976); **Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.**, 614 F. 2d 832, 841 (2d Cir. 1980); **United States v. United Shoe Machinery Corp.**, 110 F. Supp. 295, 346 (D. Mass. 1953) *aff'd per curiam*, 347 U. S. 521 (1954).

power." The Court of Appeals was clearly correct on this score. Petitioners presented no market share data and they did not produce any other evidence from which a fact finder could conclude that UPS had the requisite "power to control prices or exclude competition." To the contrary, the uncontroverted evidence demonstrated that UPS did *not* have such power. The record makes it clear that anyone with a truck can enter the parcel pickup and delivery business (Tr. 354, 1901, 1966); that there are hundreds, if not thousands, of motor carriers in the small parcel business (Tr. 186-88, 487-91, 898, 902, 1769-70, 1792-93, 1901); that there is no way in the world that UPS could ever force its major competitor, Parcel Post, out of business (Tr. 190, 199); that UPS' rates are controlled by the ICC which can reject them if they are unreasonable (Tr. 279, 534-35 and 49 U. S. C. § 10701 *et seq.*); that UPS cannot, as a practical business matter, charge rates that are appreciably higher than those of Parcel Post (Tr. 190, 199); and that, so long as Parcel Post's rates are uniform nationally, UPS' rates must also be uniform nationally (Tr. 2294-96, 2551-52, 2557-58).

Remarkably, the petition for certiorari makes absolutely no mention of the burden that the law imposes on a plaintiff making a claim of actual monopolization to show that the defendant does, in fact, possess "monopoly power." Indeed, the petition does not even cite **duPont** or **Grinnell** or any of the myriad cases that spell out the requisites of a Section 2 case.

Petitioners content themselves with a bold-face claim that the Court of Appeals **"Directly Contravened This Court's Opinion in Continental Ore v. Union Carbide and Carbon Corp."** (Pet. 19). That assertion is utterly without merit.

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U. S. 690 (1962), is simply a case in which

this Court disagreed with the conclusion of the Court of Appeals for the Ninth Circuit that a treble-damage plaintiff had produced insufficient evidence of causation to get its antitrust case to the jury. No one can deny that **Continental Ore** stands for the proposition that, in ruling on a motion for a directed verdict in a treble-damage antitrust case, the court (be it a trial court or an appellate court) must view the evidence in the light most favorable to the party against whom the motion is made. 370 U. S. at 696. But there is nothing to show that the Court of Appeals for the Second Circuit disregarded that rule in the instant case. To the contrary, the opinion below demonstrates a conscientious effort by that court to search the record to determine whether there was any proof to show that UPS possessed "monopoly power." Finding that there was none, the Court of Appeals held that petitioners had no case.

Certainly **Continental Ore** does not stand for the proposition that every treble-damage antitrust plaintiff has an absolute right to get its case to the jury. To refute any such proposal, one need only look at the decision in **Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.**, 429 U. S. 477, 489-90 (1977), a prime example of a case in which this Court held that the claims of a treble-damage antitrust plaintiff who fails to prove its case must be dismissed notwithstanding a jury verdict in the plaintiff's favor.

In any event, there is no reason for this Court to concern itself with a case like the instant one where the only question is whether particular plaintiffs have, or have not, adduced sufficient proof to get their claims to a jury.

II.

There Is Nothing to Petitioners' "Subsidization" Claim.

Petitioners would like this Court to rule "that subsidization by a dominant firm violates the antitrust laws"

(Pet. 21), but petitioners fail to indicate what particular provision of the antitrust laws would be violated by the type of "subsidization" of which they complain. The omission would not appear to be inadvertent.

Certainly petitioners cannot be claiming that a demonstration of the "subsidization" of which they complain is the equivalent of a showing of "actual monopolization" in the relevant market. Quite the contrary. If a dominant firm already has "monopoly power" in a relevant market (*i.e.*, the power to control prices or exclude competition in that market), "subsidization" would make no sense. It is only when the firm *lacks* "monopoly power" in the relevant market, that it would have any incentive to "subsidize."

Thus, when raised in the context of a Section 2 claim, a "subsidization" argument must be directed to the "attempt to monopolize" offense; but if petitioners were to concede that, they would be conceding themselves right out of court. For, as we have stated before, petitioners' "attempt to monopolize" claim was submitted to the jury on a clean record and on instructions to which petitioners did not object; and the jury found *against* petitioners on their "attempt to monopolize" claim. Certainly, there was a whole host of evidence upon which the jury could base a conclusion that there was no improper "subsidization" in this case. See pp. 9-11 *supra*. Moreover, as the Court of Appeals pointed out (Pet. App. A21-A22).

> "At most, the plaintiff's evidence established that UPSNY's prices were lower than the prices charged by some of the plaintiffs. It is questionable whether uniform nationwide rates that are subject to approval by one government agency and to competitive pressure by another can ever be considered predatory merely because the rate schedule yields prices in one

area that are lower than the prices charged by local competitors. But the plaintiffs could not prevail on their claim in any event unless they showed that the defendants' prices were unrelated to competition on the merits. Even if, as the plaintiffs contend, the defendants' uniform rates were made possible by using UPSO's profits to subsidize UPSNY's operations, the plaintiffs did not contest the defendants' showing that their nationwide rate structure was calculated to be competitive with the rate structure of the Postal Service, and that the uniformity of their rates throughout the forty-eight states made their service more attractive to shippers."

Finally we note with interest the seven lines of emphasis that petitioners give to that portion of the opinion in **Reynolds Metals Co. v. F. T. C.**, 309 F. 2d 223, 230 (D. C. Cir. 1962), where Chief Justice (then Judge) Burger discussed the "deep pocket" theory (Pet. 24). **Reynolds Metals** is clearly off point. That was a case brought under Section 7 of the Clayton Act which, of course, is fundamentally different from Section 2 of the Sherman Act. As has been pointed out in numerous cases in this Court, the Sherman Act prohibitions deal with actualities while Section 7 of the Clayton Act is a prophylactic measure which deals with acquisitions that "may" have certain apprehended consequences. Section 7 is designed to arrest restraints of trade in their incipiency. See, *e.g.*, **Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.**, 429 U. S. 477, 485 (1977) and cases therein cited. In the instant case we are not concerned with Section 7 probabilities but with Section 2 actualities—and the actuality here is that there was insufficient proof in the record for petitioners' "actual monopolization" claims to go to the jury, and the jury found, on unchallenged instructions, that there was no "attempt to monopolize."

III.

Petitioners' Section 1 Claim Had No Substance to It and Was Abandoned.

Petitioners want this Court to reverse the Court of Appeals' rejection of their Section 1 claim and to "exercise its inherent administrative power to remand this issue to the District Court" (Pet. 28). We submit that there is no occasion here for either a reversal or a remand. Petitioners' Section 1 claim never had any substance to it and, in any event, was clearly abandoned.

The Section 1 claim was directed primarily at the indemnification provision of the UPS management agreement. Petitioners contended that this provision had the purpose and effect of unreasonably restraining competition in the relevant market by enabling UPSA to use the profits earned by UPSO to subsidize predatory pricing by UPSNY. Following three years of pretrial proceedings, respondents moved for partial summary judgment on the Section 1 claim on the basis of affidavits and deposition testimony which clearly demonstrated that UPSA, UPSNY and UPSO were not competitors and had operated at all relevant times as a single enterprise rendering a uniform nationwide service. Certainly there is ample support for the proposition that "affiliated corporations cannot conspire with each other where they function as a single economic unit." **Hunt Wesson Foods, Inc. v. Ragu Foods, Inc.**, 627 F. 2d 919, 927 n.5 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1369 (1981).[6]

In opposing respondents' Section 1 motion, petitioners claimed that the UPS companies were not really a single

6. See e.g., **Ogilvie v. Fotomat Corp.**, 641 F. 2d 581, 588 (8th Cir. 1981); **Las Vegas Sun, Inc. v. Summa Corp.**, 610 F. 2d 614, 617-18 (9th Cir. 1979), *cert. denied*, 447 U. S. 906 (1980); **Photovest Corp. v. Fotomat Corp.**, 606 F. 2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U. S. 917 (1980).

enterprise and requested an opportunity to engage in further discovery in order to elicit proof to support this contention. The trial judge ruled that the capacity of the UPS companies to conspire with each other in violation of Section 1 was an issue of fact and, although respondents' factual showing was unrebutted, he continued the motion for 60 days to allow petitioners further opportunity to oppose the motion. Judge Duffy warned petitioners that, unless they submitted appropriate proof within the 60-day period, their Section 1 claim would be dismissed. But petitioners never submitted any proof whatever, despite several additional extensions of time totaling more than six months, and respondent's motion was eventually granted. However, that was not the end of the matter.

At a pretrial conference, petitioners' trial counsel inquired whether the trial judge would be willing to submit the Section 1 claim to the jury if petitioners presented evidence demonstrating that respondents had entered into an agreement prohibited by Section 1. Judge Duffy replied that, despite the order dismissing the Section 1 claim, he had an open mind on the matter and was willing to let petitioners attempt to prove the elements of the Section 1 claim. Nevertheless, petitioners failed to press the Section 1 claim before the jury, requested no jury instruction on the claim, and did not object when no Section 1 instruction was given.

The Court of Appeals was clearly correct in holding (Pet. App. A9-A10).

> ". . . [P]laintiffs abandoned their § 1 claim when they failed to pursue it at trial. The District Court's grant of the plaintiffs' request to litigate the claim before the jury afforded them a full opportunity to secure revision of the order granting the partial summary judgment prior to the entry of any final judg-

ment. The plaintiffs had more than the procedural possibility of revision contemplated by Rule 54(b); they had the District Court's explicit invitation to proceed. Their appeal from the dismissal of their claim is therefore no different from prior appeals challenging the rejection of claims and defenses that were pleaded but not properly pursued in the trial court; in such cases an appellate court will not relieve a party of the effect of its procedural default, except in the most extraordinary circumstances to prevent a miscarriage of justice. [Citations]. No such circumstances exist here."

Certainly, in view of the state of the record in this case, petitioners' Section 1 claim does not present an issue worthy of review by this Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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